



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:26.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CRP. (MD) .No.2513 of 2012 (PD)

and

M.P. (MD) .No.1 of 2012

Muthukaruppan

...Revision Petitioner / Respondent /
Defendant

Vs.

1.Murugesan

2.Ponnammal

...Respondents /Petitioners / Plaintiffs

PRAYER: This Petition filed under Article 227 of the Constitution of India to set aside the order dated 12.09.2012 in I.A.No.489 of 2012 in O.S.No.95 of 2005 on the file of the Principal District Munsif, Manamadurai.

For Petitioner : Mr.S.Parthasarathy

For Respondents : Mr.S.Srinivasa Raghavan

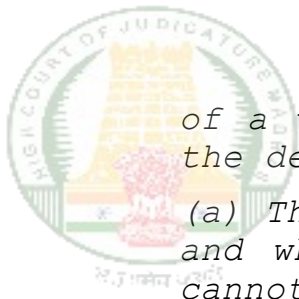
O R D E R

This Civil Revision Petition has been filed challenging the fair and final order passed by the Court below eschewing the evidence of P.W.1 and permitting the wife of P.W.1 to examine herself as P.W.1. It is seen from the records that P.W.1 was examined in chief and he was also partly cross-examined by the petitioners. Thereafter, he became sick and was not able to appear before the Court below. Therefore, an application came to be filed by the respondents / plaintiffs seeking to eschew the evidence of P.W.1 and the same has been allowed by the Court below.

2. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents.

3. The issue that is involved in this Civil Revision Petition has already been dealt with by this Court in detail while considering the scope of Section 33 of the Indian Evidence Act. This judgment was delivered in ***Dr.Sunder Vs. State of Tamil Nadu, represented by the Inspector of Police, K-4 Anna Nagar Police Station, Law and Order, Chennai***, reported in ***2019 (2) LW (Cr1.) 105***. The relevant portions of the judgment are extracted hereunder:

"17. A careful reading of the above judgments brings out the following principles while considering the evidence



of a witness who was not cross examined on the side of the defence.

(a) The statement of a witness who was examined in chief and which was admissible at the time it was recorded, cannot become inadmissible or cannot be scrapped by reason of his subsequent death or on the ground that his whereabouts are not known.

(b) Under Section 33 of the Indian Evidence Act, the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same judicial proceeding the truth of the facts which it states when the witness is dead or cannot be found or becomes incapable of giving evidence or if his presence cannot be obtained without an amount of delay or expense, provided that the proceedings was between the same parties or their representatives in interest and that the adverse party in the proceedings had the right and opportunity to cross examine the witness and he choose not to cross examine the witness for whatever reasons. One of the most important requirement to be noted is that the adverse party should have had the **right and opportunity** to cross examine the witness.

(c) The evidence of a witness who could not be subjected to cross examination due to his death or his non availability, before he could be cross examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of each case and a Court cannot discard the evidence which was duly recorded in a judicial proceeding. Where the accused person fails or declines, when he had an opportunity to cross examine, cannot be allowed to turn around and seek for scrapping the entire evidence at a later point of time on the ground that the witness has died or is not available for his cross examination.

(d) The preponderance of the judicial authority appears to be of the view that the chief examination of a witness who has subsequently died or cannot be found, does not get wiped out automatically."

4. The above judgment was rendered after considering the entire case laws on the point. This Court has categorically held that the evidence of a witness, who could not be subjected to cross-examine due to his death or his non availability, before he could be cross-examined is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of each case and the Court cannot discard the evidence, which was recorded in judicial proceedings. The evidence of a witness,



who has subsequently died or cannot be found does not get wiped out automatically.

5. In the present case, P.W.1 was examined in chief and he was also partly cross-examined by the petitioners. Thereafter, P.W.1 was not able to appear before the Court due to his old age. This cannot be a ground to completely erase the evidence that has been recorded by the Court below. Therefore, the Court below went wrong in passing an order, whereby, the evidence of P.W.1 has been struck off / eschewed and the wife of P.W.1 was permitted to examine herself as P.W.1 in this case. This procedure adopted by the Court below is against law and the fair and final order passed by the Court below requires interference of this Court.

6. It is made clear that the evidence that has been recorded from P.W.1 by the Court below shall be kept intact in the proceedings. If the wife of P.W.1 wants to examine herself as witness, she can be independently examined as a witness and it does not require the scrapping of the evidence of P.W.1.

7. In the result, the fair and final order passed by the Court below in I.A.No.489 of 2012, dated 12.09.2012, is hereby set aside and this Civil Revision Petition is allowed and the Court below is directed to complete the proceedings in O.S.No.95 of 2005, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

Sub Assistant Registrar(CS)

To

1.The Principal District Munsif, Manamadurai.

2.The Record Keeper, VR Section-2 copies

Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.SRINIVASA RAGHAVAN, Advocate (SR-101651[F] dated 27/11/2019)

+1 CC to M/s.S.PARTHASARATHY, Advocate (SR-101781[F] dated 27/11/2019)

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